Filed 3/21/19 P. v. Panasian CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ARSEN PANASIAN, Defendant and Appellant.	B281667 (Los Angeles County Super. Ct. No. PA083746)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed.

Fay Arfa for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Arsen Panasian appeals from a judgment entered after a jury found him guilty of two counts of second degree murder and two counts of gross vehicular manslaughter while intoxicated. The trial court sentenced him to 30 years to life in prison. Panasian contends the trial court committed the following reversible errors: (1) denying his motion to suppress blood alcohol concentration testing results from a warrantless blood draw, (2) admitting evidence of his 2001 and 2006 driving under the influence (DUI) convictions, and (3) failing to instruct the jury properly on causation, accident, speeding, and unanimity. He also contends there was insufficient evidence supporting his convictions and the prosecutor committed prejudicial misconduct during argument. Finding no error and sufficient evidence supporting the convictions, we affirm.

BACKGROUND

On June 20, 2015, at around 8:00 p.m., Alma and Alfred Chacon were killed when their Toyota Camry and Panasian's minivan collided at an intersection of two surface streets, controlled by traffic lights.[1] Evidence presented at trial showed Panasian, the driver and only occupant of the minivan, had a blood alcohol concentration level of 0.23 percent about two hours after the collision. Alma Chacon, the driver of the Camry, had no alcohol or drugs in her system.

The prosecution's theory at trial was that, in addition to his intoxication, Panasian was speeding and ran a red light, causing the collision that killed the Chacons. Panasian's theory at trial

---

[1] According to the coroner's medical examiner, the Chacons' injuries were consistent with their car having been "t-boned on the driver's side" by the van.

was that, although he was intoxicated and driving above the speed limit, he did not cause the collision because he was not driving at an unduly excessive speed or in an unsafe or reckless manner, and Alma Chacon ran the red light, causing the collision.

I. Prosecution Case

Panasian was traveling west on Branford Street, and the Chacons were traveling south on Dorrington Avenue, when the vehicles collided in the intersection where the two streets meet.

A. Testimony from civilian witnesses at the scene

Witnesses who were at the scene presented testimony at trial regarding the color of the traffic light at the time of the collision.

Sometime after 7:45 p.m., Mario Guardado and his girlfriend were sitting in his car when he heard the collision. His car was parked facing west on Branford, east of Dorrington, so the intersection where the collision occurred was behind him. When he heard the noise, he looked into the mirror on the outside of the driver side of his car and saw the aftermath of the collision—Panasian's van was "in the middle of the road" and the Chacons' Camry was "veering onto the sidewalk, proceeding to hit the fence at the corner of Dorrington and Branford." At the same time, through the same mirror, he noticed the traffic light for vehicles traveling on Branford (Panasian) was red. He did not observe the light change color.

At around 8:00 p.m., Daniel Martinez was out for a run on Branford. He slowed to a walk near the intersection of Branford and Dorrington. As he was changing the song he was listening to on his cell phone, he noticed two vehicles approaching the intersection, both traveling fast. He believed the vehicle on

Dorrington was moving too fast because it was approaching a red light. He noticed the light on Branford was green. He observed the vehicle on Dorrington "begin to dip" near the limit line of the intersection and believed the driver was applying the brakes. He looked back at his cell phone and continued changing the song. Five to 15 seconds later, he heard the collision, looked up, and saw a Toyota Camry moving toward him, before it crashed into a gate at the corner of Dorrington and Branford. He did not know whether the vehicle he saw "dip" before reaching the intersection was involved in the collision, but he only observed one vehicle approaching the intersection on Dorrington before the collision. He did not see any pedestrians.

B. Testimony from police officers

Los Angeles Police Department (LAPD) Officer Brandon Siebert, who contacted Panasian at the scene, observed symptoms of intoxication, including an odor of alcohol, bloodshot and watery eyes, and a red face. Officers handcuffed Panasian and took him into custody. He was placed on a gurney and loaded into an ambulance. He had some visible injuries on his shoulder, ankle, and knee.

Officer George Koval rode in the ambulance with Panasian. Koval observed symptoms of intoxication, including red and watery eyes, slurred speech, a flushed face, and a strong odor of alcohol on Panasian's breath. Koval conducted a horizontal gaze nystagmus eye examination, having Panasian follow the tip of a pen with his eyes. Koval observed nystagmus—"involuntary jerking of the eyes" and "lack of smooth pursuit"—that was "distinct and sustained . . . at max deviation." Koval formed the opinion Panasian "was under the influence of an alcoholic beverage and unable to safely operate a motor vehicle."

Officer Amanda Jansen accompanied Panasian into the emergency room. Jansen observed Panasian being "combative with medical staff" and "trying to get out of his restraints." Six to eight hospital staff members were restraining Panasian on the gurney. Jansen instructed the medical staff to take a blood sample from Panasian, and she provided a vial for their use. Panasian's blood was drawn at 9:55 p.m. Jansen placed the vial in an envelope and sealed it at the hospital and later booked it into evidence.

The following morning, an officer instructed the medical staff to take another blood sample from Panasian. His blood was drawn at 2:53 a.m. on June 21, 2015. The vial was sealed in an envelope at the hospital and later booked into evidence.

C. Blood test results

The blood sample taken from Panasian at 9:55 p.m. on June 20, 2015, the evening of the collision, showed a blood alcohol concentration level of 0.23 percent, nearly triple the legal driving limit of 0.08 percent. (Veh. Code, § 23152, subd. (b).) The sample drawn five hours later at 2:53 a.m. on June 21, 2015 showed a blood alcohol concentration level of 0.14 percent, nearly double the legal driving limit.

Manuel Medina, a criminalist from the LAPD's toxicology unit, testified "all drivers are too impaired to operate a motor vehicle safely" when their blood alcohol concentration level is at or above 0.08 percent. Medina also testified that a male who is six feet one inch tall and weighs 180 pounds—Panasian's size—

would need to drink ten 12-ounce cans of beer to produce a blood alcohol concentration level of 0.23 percent.[2]

D. Law enforcement investigation of the collision

Officer David Machain, a traffic collision investigator who responded to the scene shortly after the collision, testified the traffic lights at the intersection were unobstructed and working properly. There were no pre-collision skid marks on the street. Post-collision skid marks indicated the vehicles collided in the middle of the intersection. Machain was tasked with "collecting physical evidence," "determin[ing] the vehicles at [the] scene," and "taking measurements."

Officer Whitmore, a member of the LAPD's Multi-Disciplinary Collision Investigation Team, "looked at" both vehicles in the tow yard, accessed crash data from the air bag control modules for both vehicles, and was present when LAPD's Motor Transport Division inspected the vehicles. The Camry's air bag module showed the vehicle was traveling from 27 miles per hour down to 26 miles per hour in the five seconds before the collision, and Alma Chacon did not apply the brakes or the accelerator in the five seconds before the collision. The van's air bag module was older and did not capture pre-crash data, but it did capture the van's change in velocity upon impact. Whitmore explained: "If I know what that change in velocity was during the impact and I know how far it traveled after the crash [using Officer Machain's measurements at the scene], if I am able to

---

[2] The prosecution presented evidence indicating Panasian brought a six-pack of beer to a construction job site in the early afternoon on the day of the collision and left empty beer bottles behind when he left the site around 4:30 p.m.

interpret the physical evidence and see how it traveled from the area of impact to its at-rest position, I can figure out how fast it had to have been traveling to cover that distance. And if I know how fast it was traveling when it left the crash, and I know that it experienced a certain change of speed during the crash, I can then figure out how fast it was going when it entered the crash." Using this momentum analysis, which he explained in further depth at trial, Whitmore determined the van was traveling between 59 and 71 miles per hour just prior to the collision.

The posted speed limit on Branford where Panasian was traveling was 35 miles per hour, and the speed limit on Dorrington where the Chacons were traveling was 25 miles per hour.

E. Traffic signal timing analysis

Jeffrey Xu, an employee of the City of Los Angeles Department of Transportation who designed signal timing for intersections, reviewed documents concerning the signal operation at the intersection of Branford and Dorrington. The operation there was "semi-actuated," meaning the traffic light on Branford (the major street) stayed green until a car on Dorrington (the smaller street) actuated the "loop detector" on the ground (or a pedestrian pushed the button), informing the control box to activate the green light on Dorrington. A vehicle had to "sit on" the loop detector on Dorrington for a minimum of 12.4 seconds (and a maximum of 72.4 seconds) to activate the green light on Dorrington. Once the light on Dorrington turned green, it would remain green for a minimum of five seconds (if only one car had been waiting on Dorrington) to a maximum of 20 seconds (if a second car drove over the loop within the first five seconds). If a car drove over the loop detector on Dorrington

without stopping (ran a red light), or stopped for a few seconds (before making a right turn on red), the green light on Dorrington would not activate, according to Xu.

F. Panasian's prior DUI convictions

In 2001 and 2006, Panasian was convicted of driving under the influence. (Veh. Code, § 23152, subd. (b).) At the trial in the present case, the trial court took judicial notice that when Panasian entered his plea in the 2006 case, he "acknowledged on the record that he had reviewed the waiver of rights and plea form with his attorney, he understood it, initialed the boxes and signed the form, which included the *Watson* advisement." An officer testified at trial that a *Watson* advisement informs a defendant "of the dangers of drinking and driving and that it could cause serious bodily injury or death." The court in the 2006 case did not present the *Watson* advisement orally.

In August 2006, Panasian enrolled in an 18-month court-mandated alcohol education program, which included instruction about the dangers of drinking and driving. In February 2008, he completed the program, which required 52 hours of group sessions, 12 hours of education classes, 26 Alcoholics Anonymous meetings, and 26 bi-weekly interviews. The program "stress[ed]" that death of self or others could result from drinking and driving.

II. Defense case

A. Expert testimony regarding the traffic lights

Babak Malek, a forensic scientist employed by the Institute of Risk and Safety Analysis, specialized in accident reconstruction, biomechanical analysis, and human factors analysis. He reviewed the LAPD's traffic collision report and supplemental reports, photographs of the accident scene and

vehicles, transcripts of the preliminary hearing testimony of Guardado and Martinez, and the traffic timing chart and traffic timing plan from the City of Los Angeles Department of Transportation.

According to Malek, if a car traveling on Dorrington drove over the loop detector without stopping (ran a red light), the traffic light on Dorrington would turn green in a minimum of 6.4 seconds.

Employing momentum analysis, Malek calculated the speed of the vehicles just prior to the collision, using the area of impact, the vehicles' points of rest, and the post-collision skid marks. Malek determined the van was traveling between 49 and 52.4 miles per hour, with an average speed of 50.7 miles per hour. He determined the Camry was traveling between 24 and 28 miles per hour, with an average speed of 26.7 miles per hour. Malek believed the LAPD's speed calculation for the van (59 to 71 miles per hour) was incorrect because it did not take into account that the intersection was "at a diagonal" and was "not perfectly a perpendicular intersection," so the LAPD's calculations of "the distance traveled post-impact for both vehicles were wrong."

After considering the "actuation criteria for Dorrington," the "green phase for Dorrington," the speed of the vehicles, and the preliminary hearing testimony of Guardado and Martinez, Malek opined the Camry (Alma Chacon) ran the red light at the time of the collision. He was aware of no evidence indicating the van ran the red light.

Based on Malek's calculations, the Camry was 176 feet away from the area of impact 4.4 seconds before the collision, so the Camry could not have had a green light on Dorrington at the time it entered the intersection because the minimum amount of

time to change the light from red to green (6.4 seconds) had not elapsed after the Camry drove over the loop detector. Malek testified that if another car ahead of the Camry activated the loop detector on Dorrington, the Camry would not have had enough time to make it to the intersection on the green light.

According to Malek, Guardado's testimony that he looked in his driver side car mirror after he heard the collision and saw a red light on Branford was consistent with the Camry running the red light on Dorrington and activating the loop detector, which caused the light on Dorrington to change from red to green. If Martinez saw a red light on Branford and only two vehicles approaching the intersection five seconds before the collision, as he testified, the Camry must have driven over the loop detector on Dorrington to activate the green light. Malek conceded, however, based on his speed calculation, the Camry would have been out of Martinez's field of vision five seconds or more before the collision.

B. Additional testimony from Daniel Martinez

Martinez testified to the same facts he presented in the prosecution case, as set forth above. In the defense case, however, he stated he heard the collision five seconds, "*maybe less*," after he looked away from the intersection to change the song on his phone (instead of the five to 15 seconds he estimated in the prosecution case). (Italics added.) While Martinez stated he was "a hundred percent" sure the traffic light on Branford was green when he looked into the intersection seconds prior to the collision, he conceded he did not know the color of the traffic lights at the time of the collision.

DISCUSSION

I. Motion to Suppress Results of Warrantless Blood Draw

Panasian contends the trial court erred in denying his motion to suppress his blood test results (from the first blood draw at 9:55 p.m.), arguing "the police conducted an unreasonable search and seizure and violated [his] Fourth Amendment rights" by having his blood drawn at the hospital for chemical testing by law enforcement without a warrant.

A. The hearing

Three LAPD officers testified at the hearing on Panasian's motion to suppress. Officer Seibert testified about Panasian's conduct at the scene—that he failed to comply in the first instance with a command that he turn and face the van, and that he resisted being handcuffed by kicking his feet backward and flailing his arms, resulting in multiple officers taking him to the ground to be handcuffed. Seibert also testified about the symptoms of intoxication he observed at the scene: the odor of alcohol on Panasian, his bloodshot and watery eyes, and his red face.

Officer Koval testified about the results of the horizontal gaze nystagmus eye examination he administered in the ambulance on the way to the hospital and the other symptoms of intoxication he observed (consistent with his trial testimony, as set forth above). He also stated that during the ambulance ride, Panasian "was doing a lot of yelling and screaming and constantly tried to break away from his cuffs."

Officer Jansen testified that in the emergency room, she observed six to eight members of the hospital staff attempting to restrain Panasian on a gurney. Jansen asked a nurse if they had

sedated Panasian because she wanted to obtain a blood sample from him. The nurse said they had not yet sedated him but planned to do so because he was not cooperating with the medical examination. Jansen asked Panasian if she could obtain a blood sample because he was under arrest for a DUI. Panasian "mumbled something which was incoherent." Jansen repeated the question "a couple of times," but Panasian's response remained incoherent, as he looked away from her. Jansen requested a nurse draw Panasian's blood, and the nurse complied. Panasian did not resist as the nurse drew his blood.

On cross-examination Jansen testified she did not attempt to obtain a search warrant by telephone prior to the blood draw because (1) "the medical staff was about to sedate him," which could affect the test result if Panasian was under the influence of drugs, (2) "a retrograde extrapolation of the blood alcohol content" could not be calculated at a later time because Panasian had not answered any questions about when he started and stopped drinking, what he ate, etc., and (3) Panasian did not refuse consent for the blood draw.

After hearing oral argument, the trial court denied Panasian's motion to suppress, finding:

"So here we have a very serious traffic collision in which two people suffered fatal injuries. From the moment the defendant was contacted by officers, he was combative, requiring the use of physical restraints both in the field, in the ambulance and he had to be restrained at the hospital, which delayed the investigation of the accident and prevented field sobriety tests from being performed and also prevented the officers from getting information.

"Defendant was yelling profanities at the officers, thereby preventing the officers from determining when he had stopped drinking.

"In this case, the defendant did not overtly refuse a blood draw. And [defense counsel] said maybe he didn't understand what was going on or maybe he looked the other way, but there was no affirmative 'no' in this case.

"And I will also indicate that he also was able to follow the directions of the officer in the ambulance with regard to following the pen [during the horizontal gaze nystagmus eye examination]. And he did show some concern about what happened to the victims, so he was alert in the ambulance.

"In addition, at the hospital, the defendant had to be assessed for injuries, any impending medical investigation had to continue, and they had to determine what procedures, if any, needed to be done to determine the extent of his injuries.

"The officer testified, Officer Jansen, that she asked if the defendant had been sedated or was going to, and they said not yet. They were going to. [Defense counsel] is right with regard to the aspect that medication used to sedate would not alter blood alcohol results. However, they didn't know what he was under the influence of at the time. For example, if he was given valium as a sedative, it could have shown that he had valium in his system which could have skewed any results with regard to . . . narcotics in the blood.

"So, therefore, under these circumstances showing an unresponsive drunk driving suspect who didn't affirmatively say 'no,' that he did not . . . refuse to give consent, based on his actions, the fighting, the yelling, the profanities, the need to

restrain, and I believe there was an exigency to get the blood before he was given any sedatives."

B. Legal standards and analysis

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

Warrantless searches, such as the blood draw at issue here, "are presumptively unreasonable unless conducted pursuant to one of the narrowly drawn exceptions to the warrant requirement. [Citations.] One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. [Citation.] In some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. [Citations.] However, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . [citation], it does not do so categorically. [¶] To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, the court looks to the totality of the circumstances." (*People v. Toure* (2015) 232 Cal.App.4th 1096, 1103; *Missouri v. McNeely* (2013) 569 U.S. 141, 148-156.)

In *People v. Toure*, *supra*, 232 Cal.App.4th 1096, a case with facts similar to those before us, the Court of Appeal affirmed the trial court's denial of the defendant's motion to suppress,

concluding the "nonconsensual warrantless blood draw was reasonable under the totality of the circumstances." (*Id.* at p. 1105.) After "a traffic accident in which at least one person sustained injuries," the defendant "was combative, requiring the administration of physical restraints, which delayed the police officers' investigation of the accident and prevented the officers from conducting field sobriety tests." (*Id.* at p. 1104.) The defendant "refused to provide officers with information, yelling profanities at them, thereby preventing the officers from determining when he had stopped drinking." (*Ibid.*) The appellate court decided "the delays involved in obtaining a warrant . . . , the unavailability of information relating to when defendant stopped drinking, in addition to the natural dissipation of alcohol in the blood, coupled with his violent resistance, established exigent circumstances." (*Id.* at p. 1105, fn. omitted.)

Based on the totality of the circumstances, as found by the trial court and supported by substantial evidence, we conclude exigent circumstances justified the warrantless blood draw. Panasian was combative and uncooperative and needed to be restrained, both at the scene of the collision and the hospital, so no field sobriety tests were conducted at the scene and medical staff intended to sedate him. Officers had been unable to gather information about what and when Panasian drank/ingested. Accordingly, a delay in obtaining a search warrant would have prevented law enforcement from determining Panasian's blood alcohol concentration level at the time of the collision. To the extent Panasian ingested narcotics in addition to alcohol, sedation would have affected the blood test results. Moreover, although Panasian resisted officers at the scene and medical staff

at the hospital, there is no evidence he resisted the blood draw or refused consent.

II. Admission of Prior DUI Convictions

Panasian contends the trial court erred in admitting his 2001 and 2006 DUI convictions over his objection to establish he had prior awareness of the dangers of driving under the influence, arguing the evidence was "more prejudicial than probative and only proved [his] propensity to commit the charged offense." We review the trial court's decision to admit this evidence for abuse of discretion. (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 112.)

To prove implied malice for second degree murder, prior "convictions and exposure to mandatory educational programs are admissible to show the accused's awareness of the life threatening risks of driving under the influence." (*People v. Covarrubias* (2015) 236 Cal.App.4th 942, 948.) Such evidence also is admissible to establish whether a reasonable person in the defendant's position would have been aware of risks required for a finding of gross negligence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1204-1206.)

The trial court instructed the jury with CALCRIM No. 303, stating:

"During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.

"The People presented evidence regarding the defendant's prior driving under the influence convictions. This evidence was admitted for the limited purpose of establishing implied malice as required in instruction 520, specifically whether the defendant had prior awareness of the dangers of driving while under the

influence of alcohol. This evidence was also admitted for the limited purpose of establishing whether a reasonable person in the defendant's position would have been aware of risks required for a finding of gross negligence, as required in instruction 590. Do not consider the evidence as proof that the defendant committed any of the crimes with which he is currently charged or for any other purpose, unless instructed otherwise by the court."

As the case law and jury instruction cited above make clear, evidence of prior DUI convictions and educational programs is probative of elements of the charged offenses. It is not inadmissible propensity evidence. (Evid. Code, § 1101, subd. (a).) The probative value of the evidence—showing Panasian drove under the influence of alcohol for a third time after completing an intensive 18-month educational program about the risks—is not substantially outweighed by a "substantial danger of undue prejudice." (Evid. Code, § 352.) As compared with the facts of the present case in which two people were killed, evidence of the two prior DUI convictions was not unduly prejudicial.

We reject Panasian's argument that his convictions were so remote in time that they "fail to prove he would know the risks to others if, up to fifteen years later, he drove after drinking." We have no reason to believe Panasian forgot about the risks of drinking and driving after completing an 18-month intensive program in 2008. Moreover, remoteness generally goes to the weight, not the admissibility, of evidence. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1173.)

Accordingly, the trial court did not abuse its discretion in admitting evidence of Panasian's prior DUI convictions.

III. Sufficiency of the Evidence

"In reviewing the sufficiency of the evidence, we must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] It is the jury, not an appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] The appellate court may not substitute its judgment for that of the jury or reverse the judgment merely because the evidence might also support a contrary finding." (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 681.)

A. Implied malice

Panasian contends there was insufficient evidence of implied malice to support his convictions for second degree murder because "the defense presented compelling forensic evidence that [he] had the green light," and the evidence showed he "did not drive at an unduly excessive speed" or in an unsafe or reckless manner.

" 'Murder is the unlawful killing of a human being . . . with malice aforethought.' ([Pen. Code,] § 187, subd. (a).) When a person commits a murder without premeditation and deliberation, it is of the second degree. ([Pen. Code,] § 189.) In a second degree murder, the 'malice may be express or implied.' ([Pen. Code,] § 188.) 'Malice is implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with conscious disregard for that danger.' " (*People v. Wolfe*, *supra*, 20 Cal.App.5th at p. 681.) Malice "may be implied when a person,

knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life." (*People v. Watson* (1981) 30 Cal.3d 290, 296.)

Where appellate courts have upheld "murder convictions in cases where defendants have committed homicides while driving under the influence of alcohol," some or all of the following factors tending to show implied malice have been present: " '(1) blood-alcohol level above the 0.08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving.' " (*People v. Wolfe*, *supra*, 20 Cal.App.4th at pp. 682-683.)

The prosecution presented substantial evidence showing Panasian acted with implied malice. When he got behind the wheel on June 20, 2015, he was aware of the life threatening risk of driving under the influence, having completed an intensive 18-month educational program on the subject and sustained two prior DUI convictions. Yet, he drove after consuming the equivalent of ten 12-ounce cans of beer. His blood alcohol concentration level was 0.23 percent, nearly triple the legal driving limit.

Substantial evidence also showed Panasian engaged in highly dangerous driving. He speeded down a surface street with a posted limit of 35 miles per hour, traveling between 59 and 71 miles per hour. Despite Panasian's claim to the contrary, the prosecution presented substantial evidence he ran the red light. Guardado observed a red light on Branford, immediately after he heard the collision and looked to the intersection. If the jury found Guardado credible, it would have been reasonable for the jury to find there was insufficient time for the traffic light on Branford to turn red if it was the Camry that ran the red light on

Dorrington. Moreover, it would have been reasonable for the jury to find the car Martinez saw approaching the intersection five to 15 seconds before the collision was not the Camry because the Camry would have been outside his field of vision at that time, as Panasian's expert conceded. A reasonable inference from the evidence is that a car traveling on Dorrington ahead of the Camry triggered the green light on Dorrington before the Camry drove through the intersection.

The jury found Panasian acted with implied malice, and substantial evidence supports the finding.

B. Gross negligence

Panasian contends there was insufficient evidence of gross negligence to support his convictions for gross vehicular manslaughter while intoxicated.

"Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence." (Pen. Code, § 191.5, subd. (a).)

" 'Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. . . . The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved.' " (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1171.)

As set forth above, substantial evidence demonstrates Panasian drove while severely intoxicated, at an excessive speed, and ran a red light, while being aware of the life threatening risk of driving under the influence. We have no cause to disturb the jury's finding of gross negligence.

C. Causation

Panasian contends there was insufficient evidence he caused the Chacons' deaths because "the Camry's failure to stop at the red light caused the accident." As outlined above, the prosecution presented substantial evidence demonstrating Panasian ran the red light while traveling at an excessive speed and collided with the Chacons' car. It was for the jury to resolve the conflicts in the evidence and this court is not tasked with reweighing the evidence or evaluating the credibility of witnesses.

IV. Jury Instructions[3]

A. Causation

Panasian contends the "trial court's failure to issue a correct causation instruction prejudiced Panasian because the trial court's causation instruction focused only on Panasian's driving and prevented the jury from finding the Camry's failure to stop at the red light constituted the sole cause of the accident."

Using CALCRIM Nos. 240 (Causation), 520 (Second Degree Murder), and 590 (Gross Vehicular Manslaughter While Intoxicated), the trial court instructed the jury, in pertinent part:

---

[3] The Attorney General argues Panasian forfeited his contentions by failing to request additional instructions below. Panasian argues his trial counsel rendered ineffective assistance in failing to request additional instructions. Accordingly, we review Panasian's contentions on the merits.

"An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all circumstances established by the evidence."

The trial court gave no instruction indicating the jury could convict Panasian of murder or gross vehicular manslaughter if the jury found the Camry's failure to stop at a red light was the sole cause of the collision. As the Court of Appeal stated in *People v. Elder* (2017) 11 Cal.App.5th 123, the "direct, natural, and probable consequence" language quoted above explains sole or superseding causation. (*Id.* at pp. 136-137 ["the trial court was not required to give [the defendant's proposed instruction] because the jury was already adequately instructed on superseding causation with the pattern instructions for the elements of each charged offense. As we have noted, CALCRIM No. 590 was given to the jury and stated that defendant could be found guilty only if the death or injury was the natural and probable consequence of his conduct, meaning that nothing unusual intervened"].)

The jury was properly instructed on causation.

B. Accident

Panasian contends the trial court erred in failing to instruct the jury with CALCRIM Nos. 510 (Excusable Homicide: Accident) and 3404 (Accident).

A trial court has a duty to instruct on a defense " 'if it appears . . . the defendant is relying on such defense, or if there is substantial evidence supportive of such defense and the defense

is not inconsistent with the defendant's theory of the case.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 73.)

CALCRIM No. 510 provides:

"The defendant is not guilty of (murder/ [or] manslaughter) if he killed someone as a result of accident or misfortune. Such a killing is excused, and therefore not unlawful, if:

"1. The defendant was doing a lawful act in a lawful way;

"2. The defendant was acting with usual and ordinary caution;

"AND

"3. The defendant was acting without any unlawful intent.

"A person acts with *unusual and ordinary caution* if he acts in a way that a reasonably careful person would act in the same or similar situation.

"The People have the burden of proving beyond a reasonable doubt that the killing was not excused. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] manslaughter)."

CALCRIM No. 3404 provides:

For general or specific intent crimes: "The defendant is not guilty of [the crime] if he acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of [the crime] unless you are convinced beyond a reasonable doubt that he acted with the required intent."

For criminal negligence crimes: "The defendant is not guilty of [the crime] if he acted [or failed to act] accidentally without criminal negligence. You may not find the defendant guilty of [the crime] unless you are convinced beyond a

reasonable doubt that he acted with criminal negligence. *Criminal negligence* is defined in another instruction."

The evidence showed Panasian was driving in excess of the posted speed limit, with a blood alcohol concentration nearly three times the legal driving limit. He did not act accidentally. These instructions are inapplicable.

C. Speeding

Panasian contends the trial court erred in giving an instruction on speeding and in failing to give a complete instruction on speeding.

During a discussion with the prosecutor and the trial court regarding jury instructions, defense counsel argued the prosecution "never offered any evidence at all that the speeding . . . caused the death." Counsel objected to the use of speeding as the unlawful act to prove gross vehicular manslaughter. The trial court responded: "The evidence of Officer Whitmore said that the van was going between 59 and 71 miles per hour. Certainly that's excessive -- it may be excessive speed. It's the jury's determination to make. And because of the velocity of the van at the time of impact, certainly that would have had some type of -- it would have resulted in greater impact. So that's a question of fact for the jury."

The trial court instructed the jury that one element of gross vehicular manslaughter while intoxicated that the prosecution needed to prove was that "while driving that vehicle under the influence of alcohol, the defendant also committed a red light violation and/or excessive speeding." (CALCRIM No. 590.)

Using a special instruction, the trial court instructed the jury as follows on an excessive speed violation:

"The infraction of excessive speed, in violation of Vehicle Code § 22350, is defined as follows:

"No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.

"The People have the burden of proving beyond a reasonable doubt that the defendant committed an excessive speed violation."

Panasian argues the "prosecution, relying on Panasian's intoxication, his alleged failure to stop at the red light, and his prior DUI convictions, never proved an evidentiary link between speeding and the accident." We agree with the trial court it was for the jury to decide whether Panasian's excessive speed was a substantial factor in causing the Chacons' deaths. (CALCRIM No. 240 ["There may be more than one cause of death. An act causes death, only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not have to be the only factor that causes the death"].) The prosecution presented evidence regarding the speed the van was traveling and the nature of the impact during the T-bone collision.

Panasian further contends the speeding instruction was "incomplete and erroneous" because it omitted the portion of CALCRIM No. 595, stating: "The speed of travel, alone, does not establish whether a person did or did not violate the basic speed law. When determining whether the defendant violated the basic speed law, consider not only the speed, but also all surrounding conditions known by the defendant and also what a reasonable

person would have considered a safe rate of travel given those conditions. [¶] The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel and includes a street. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant's rate of travel was not reasonable given the overall conditions, even if the rate of travel was faster than the prima facie speed law. If the People have not met this burden, you must find the defendant did not violate the prima facie speed law."

As set forth above, the instruction the trial court gave on speeding was a verbatim recitation of the speed law, Vehicle Code section 22350. The "definitions" in Vehicle Code section 22350 "supply the jury with legal standards to apply" the basic speed law. (*People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.) The court's instruction required the jury to evaluate whether the speed the van was traveling was reasonable in light of the conditions and whether the speed endangered persons or property. The instruction was a correct statement of the law and was not inadequate or erroneous.

D. Unanimity

Panasian contends the trial court had a duty to give a unanimity instruction, requiring the jury to agree on the traffic offense Panasian committed (driving while intoxicated, speeding, or running a red light for the murder convictions; and speeding or running a red light for the gross vehicular manslaughter while intoxicated convictions).

"As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of

the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty." (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

Driving while intoxicated, speeding, and running a red light were not separate acts. They occurred simultaneously as part of a continuous course of conduct. (See *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 ["There was here no substantial separation in time or place in connection with Mitchell's driving while intoxicated as he rounded the curve at Palomar Airport Road driving at an unsafe speed, trying to overtake Wiley's car in a speed contest. Mitchell committed a continuing offense"].) " 'Neither an election nor a unanimity instruction is required when the crime falls within the "continuous conduct" exception,' " where "the criminal acts are so closely connected that they form part of the same transaction." (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1178.)

Moreover, a "unanimity instruction as to a single act need not be given where the acts proved are 'just alternate ways of proving a necessary element of the *same offense*.' " (*People v. Mitchell*, *supra*, 188 Cal.App.3d at p. 222 [because the "unsafe speed and speed contest elements of the drunk driving charge here fall within the category of alternate ways of proving a necessary element of the same drunk driving charge," no unanimity instruction was required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 587 ["In the case at hand, defendant was charged with one count of vehicular manslaughter in violation of Penal Code section 192, subdivision (c)(3), of which one element is 'the commission of an unlawful act, not amounting to a felony.' The possible alternative Vehicle Code violations set forth in the trial

court's instruction . . . are just alternate ways of proving a necessary element of the same offense"].)

For these reasons, a unanimity instruction was not required.

V. Prosecutorial Misconduct

Panasian contends, "During closing, the prosecutor improperly appealed to the passions and sympathies of the jury and disparaged defense counsel. The prosecutor's comments during closing constituted prosecutorial misconduct and deprived Panasian of due process and a fair trial. [Citations.] Trial counsel rendered ineffective assistance by failing to object."

"[A]ppeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial." (*People v. Fields* (1983) 35 Cal.3d 329, 362.) " 'It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." ' " (*People v. Redd* (2010) 48 Cal.4th 691, 742.)

The prosecutor argued: "Return an honest verdict based on the evidence, based on the truth, based on justice. Not only for Mr. Panasian, who is seated here at trial, but justice for the victims in this case who never had a trial. They can't tell their side of the story. Only through the evidence that shows that the defendant committed these crimes and that he has to be held accountable for his actions. Find him guilty. Thank you." Here, the prosecutor told the jury if it based its verdict on the evidence and the truth, it would bring justice for both Panasian and the

deceased victims. The prosecutor did not ask the jury to deviate from its proper role. There was no misconduct.

" 'A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.' [Citations.] 'In evaluating a claim of such misconduct, we determine whether the prosecutor's comments were a fair response to defense counsel's remarks' [citation], and whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion." (*People v. Edwards* (2013) 57 Cal.4th 658, 738.) We are mindful that a " ' "prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." ' " (*People v. Lloyd* (2015) 236 Cal.App.4th 49, 61.)

Panasian quotes seven passages from the transcript of the prosecutor's argument that he finds objectionable. Therein, the prosecutor made statements, such as "he got up here, and from my memory of what was presented in the evidence, it was a lot different than what he told you it was"; "what [defense counsel] told you is not true about the integrity of the case"; "That is a dishonest, insincere argument. Another misstatement of facts"; and other, similar statements.

We have reviewed the totality of the statements with which Panasian takes issue, and conclude there was no misconduct. The prosecutor disagreed with defense counsel's presentation of the evidence and the foundation of the defense case. The statements were within the scope of proper argument.[4]

---

[4] Panasian also contends we must reverse his convictions based on cumulative error. We have found no error to cumulate.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.